In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 930

WILLIAM J. ROCHELLE, JR., Trustee In Bankruptcy for JOHN MILTON ADDISON, Bankrupt, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The question in this case is whether money a swindler obtained from his victims in the guise of "loans" for nonexistent business ventures, which he had no intention of repaying, was properly includible in his gross income.

John Milton Addison was adjudicated a bankrupt on July 7, 1960. He was a large-scale promoter of uranium mining ventures who collected immense sums of money, including at least $833,000 in 1959. (R. 10-12, 156-157.) To induce "lenders" to let him have

money, Addison, either personally or through associates, made false and fraudulent misrepresentations, among which were that there was a fortune of untold millions involved in a uranium mine he owned; that persons who "loaned" him money would become joint owners; that Merrill Lynch, Pierce, Fenner & Bean had offered to purchase 49% of his money interest for $18,000,000; and that he owned patent rights to the "Benson Upgrader", which, at a cost of $65,000, would replace a uranium mill costing $13,000,000, and would earn a net profit of $86,000 a day (R. 13-15, 158-160). He obtained "loans" from 1955 until his adjudication in bankruptcy. He promised to repay with interest and gave most "lenders" written promissory notes.[1] The Referee in Bankruptcy found, however (R. 15):

> There is no evidence that the Bankrupt in fact did in good faith intend to repay the money or interest thereon in accordance with his promises, and the inference which I draw from the evidence is that he had no such intention.

On July 2, 1959, the Commissioner of Internal Revenue, pursuant to Section 6851 of the Internal Revenue Code of 1954, terminated Addison's tax year, and assessed a tax liability of $124,485.24 for the

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[1] After complaint of the Securities and Exchange Commission, Addison ceased issuing notes, and thereafter orally said he would repay with interest (R. 13, 158). See *Securities and Exchange Commission* v. *Addison*, 194 F. Supp. 709 (N.D. Texas). He and five associates were later convicted of violating the Securities and Exchange Act, using the mails to defraud, and conspiracy. See *Addison* v. *United States*, 317 F. 2d 808 (C.A. 5).

taxable period January 1, 1959, through June 30, 1959. On July 3, 1959, the District Director served a notice of levy, and perfected a lien, with respect to $125,700 of cashier's checks, bank money orders, and American Express money orders, and $20,925 in personal checks payable to Addison, all of which were in the custody of Braniff Airways. The property was ultimately delivered to the receiver in bankruptcy, who is the petitioner here, subject to such rights as the United States had as the result of its levy and lien. (R. 10-12, 156-157.)

The United States filed a timely proof of claim for taxes, in the amount of $1,030,848,97, with interest. This petition involves $124,485.24 which the United States asserted to be secured by lien and levy prior to bankruptcy, and, therefore, entitled to priority over all other claims against the bankrupt estate. (R. 12.)

The Referee concluded that the funds advanced were in fact "loans" and not within the bankrupt's income (R. 16). The district court affirmed (R. 155-166), concluding that under the rationale of *James* v. *United States*, 366 U.S. 213, there was a "consensual recognition, express or implied, of an obligation to repay" (R. 163). The court of appeals reversed, holding that the funds were not *bona fide* loans because they were obtained to finance nonexistent business ventures with no intention to repay, and therefore constituted money received through theft and swindling, which was taxable income to the bankrupt (Pet. 11-18).

This decision is correct. There is neither a conflict nor any other basis for further review.

There is no doubt that Addison, through his fraudulent acts, obtained the unrestricted economic use of the money he received. The large sums obtained through his swindles were indeed his sole source of support for several years (Pet. 16). In principle, then, this case is controlled by *Rutkin* v. *United States*, 343 U.S. 130. There, this Court held that an extortionist realizes income when he receives extorted money, stating (p. 137):

> An unlawful gain, as well as a lawful one, constitutes taxable income when its recipient has such control over it that, as a practical matter, he derives readily realizable economic value from it. *Burnet* v. *Wells*, 289 U.S. 670, 678; *Corliss* v. *Bowers*, 281 U.S. 376, 378. That occurs when cash, as here, is delivered by its owner to the taxpayer in a manner which allows the recipient freedom to dispose of it at will, *even though it may have been obtained by fraud and his freedom to use it may be assailable by someone with a better title to it.* [Emphasis added.]

Then, in *James* v. *United States*, 366 U.S. 213, this Court specifically overruled *Commissioner* v. *Wilcox*, 327 U.S. 404, which had held embezzled funds not to be income to the embezzler. In rejecting the theory of *Wilcox*, that an embezzler does not receive income because he holds the money "without any semblance of a bona fide claim of right", *id.* at 408, this Court said (366 U.S. at 216-217):

> Both Wilcox and Rutkin obtained the money by means of a criminal act; neither had a bona fide

> claim of right to the funds. Nor was Rutkin's obligation to repay the extorted money to the victim any less than that of Wilcox. The victim of an extortion, like the victim of an embezzlement, has a right to restitution. Furthermore, it is inconsequential that an embezzler may lack title to the sums he appropriates while an extortionist may gain a voidable title. Questions of federal income taxation are not determined by such "attenuated subtleties." *Lucas* v. *Earl*, 281 U.S. 111, 114; *Corliss* v. *Bowers*, 281 U.S. 376, 378. (footnote omitted).

Plainly, under these decisions, the fruits of Addison's swindles were part of his income.

Petitioner's cause is not advanced by the reference in *James* to the absence of a "consensual recognition, express or implied, of an obligation to repay" (366 U.S. at 219; Pet. 5), and the quotations from the Government's brief in *James* (Pet. 4), distinguishing "loans" from embezzled funds. Both refer to *bona fide* loans and a true debtor-creditor relationship. Such an obligation must be consensual in both sides. It cannot exist where a confidence man falsely promises to repay. "[O]therwise," as the court below reasoned (Pet. 18), "confidence men could avoid the tax consequences of their transactions by merely adding a false promise to repay to their other representations." [2]

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[2] Compare *Akers* v. *Scofield*, 167 F. 2d 718 (C.A. 5) (funds obtained through swindle without promise to repay); see, also, *Cohen* v. *United States*, 297 F. 2d 760 (C.A. 9) (transactions purported to be loans held income); *Clark* v. *Commis-*

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

MITCHELL ROGOVIN,
Assistant Attorney General.

DAVID O. WALTER,
CAROLYN R. JUST,
Attorneys.

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sioner, 266 F. 2d 698 (C.A. 9) (whether a withdrawal is a loan depends on the existence of an intent to repay at the time of withdrawal).

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